No. 45459-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

PROTECT THE PENINSULA'S FUTURE ("PPF"),
Appellant,

WASHINGTON ENVIRONMENTAL COUNCIL ("WEC"),
Respondent,

v.

GROWTH MANAGEMENT HEARINGS BOARD, and
CLALLAM COUNTY,
Respondents.

BRIEF OF APPELLANT

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[REVISED] TABLE OF AUTHORITIES FOR BRIEF OF APPELLANT

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DECLARATION OF SERVICE

I, GERALD STEEL, under penalty of perjury under the laws of the State of Washington declare as follows: I am the attorney for Appellant. On April 25, 2014, I caused:

1. [REVISED] Table of Authorities for Brief of Appellant [Approved for Filing by Ruling on 4-11-14]

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Dated this 25th day of April, 2014, at Olympia, Washington.

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I. INTRODUCTION

This appeal is necessary because the Growth Management Hearings Board ("Growth Board" or "GB") in its first case involving the Voluntary Stewardship Program ("VSP") of the Growth Management Act ("GMA") has erroneously interpreted and applied the VSP statutory provisions. Prior to adoption of the VSP, all counties and cities in the state were required to adopt development regulations to protect critical areas. (RCW 36.70A.060(2).)[1] These development regulations are required to use best available science to protect the functions and values of critical areas with special consideration to preserve anadromous fisheries. (RCW 36.70A.172(1).)[2]

Clallam County ("County") adopted a regulation (CCC 27.12.035(7))[3] in 2001 that exempted preexisting agriculture from critical area protection requirements on lands in the open space tax program (Ch. 84.34 RCW) when some best management practices ("BMPs") are used. This regulation does not require BMPs that actually protect critical areas. BMPs can just protect air quality or reduce energy use. There is no monitoring program and so no actual protection of critical areas is ensured. In 2001, the Growth Board found this agriculture exemption in noncompliance with the GMA and invalid.[4] Also in this Growth Board 2001 Order, the Growth Board ruled that the County would need "an effective monitoring program" for any agriculture exemption based on BMPs to comply with the GMA.[5]

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[1] A-11 hereto. "A-11" refers to Appendix page A-11 to this Brief.
[2] A-12 hereto.
[3] *Infra* at 15-16.
[4] *PPF v. Clallam County,* GB cases 00-2-0008 and 01-2-0020 (Compliance Order and Final Decision and Order, Oct. 26, 2001) ("Growth Board 2001 Order") (AR 149-59). "AR 149-59" refers to pages 149-59 in the Administrative Record.
[5] AR 155.

The County appealed the Growth Board 2001 Order to court arguing that preexisting agriculture uses should be exempt from all critical areas regulation. In response, Division II held that "preexisting agricultural uses are not exempt from all critical areas regulation." *Clallam County v. Growth Board*, 130 Wn.App. 127, 140, 121 P.3d 764 (2005), review denied, 163 Wn.2d 1053 (2008). Division II also held that if the County wanted to continue to exempt small farms, it:

> must then show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife.

(*Id.*)

Without applying these Division II remand instructions or making any further analysis of its 2001 agricultural exemption, the County brought a motion in September 2012 asking the Growth Board to find this unchanged exemption now in compliance with the GMA because of a County misinterpretation of the plain meaning of the recently adopted VSP.

PPF argued that the County's interpretation of the VSP was absurd. But this misinterpretation was accepted by the Growth Board which then dismissed the Growth Board cases without actually making a finding of compliance.[6] The Growth Board 2012 Order was upheld by the Superior Court 2013 Order ("2013 Order").[7] PPF brings this appeal back to Division II. PPF asks this Court to reverse the 2012 and 2013 Orders, and then remand this matter back to the Growth Board with further instructions.

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[6] *PPF v. Clallam County*, GB cases 00-2-0008 and 01-2-0020 (Order on Motion to Dismiss, December 13, 2012) (A-1 to A-10 hereto) ("Growth Board 2012 Order").

[7] CP 107-08. "CP 107-08" refers to pages 107 to 108 in the Clerk's Papers.

II. ASSIGNMENTS OF ERROR

A. Errors Of The Superior Court

No. 1. Error in affirming the challenged Growth Board 2012 Order.[8, 9]

No. 2. Error in failing to take official notice of certain documents and facts relevant to this case.

B. Errors Of The Growth Board

No. 1. Error in finding in A-4 hereto, lines 24-27 and Note 11, that the VSP established an alternative method for counties to comply with RCW 36.70A.060.

No. 2. Error in finding in A-7 hereto, lines 18-20, that the legislature concluded that the **existing** development regulations of Clallam County were necessarily sufficiently protective of critical areas in areas used for agriculture.

No. 3. Error in finding in A-7 hereto, lines 8-12, that "fall back" provisions in RCW 36.70A.735(1)[10] "require the county to adopt development regulations to protect critical areas, just as RCW 36.70A.060[11] does."

No. 4. Error in finding in A-7 hereto, lines 21-31, that there was a realistic potential of an absurd result that another county leaving the VSP would be

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[8] The challenged Superior Court 2013 Order is *PPF v. Growth Board*, Jeff. Co. Sup. Ct. 13-2-00009-1 (Order Affirming the Growth Management Hearings Board's Order, August 28, 2013) (CP 107-08).

[9] The challenged Growth Board 2012 Order is *PPF v. Clallam County*, GB cases 00-2-0008 and 01-2-0020 (Order on Motion to Dismiss, December 13, 2012) (A-1 to A-10 hereto).

[10] A-16 to A-17 hereto.

[11] A-11 hereto.

allowed to adopt Clallam County Code ("CCC") 27.12.035(7)[12] when Clallam County was not allowed to rely on CCC 27.12.035(7).

No. 5. Error in finding in A-8 hereto, lines 4-6, that the Clallam County interpretation presented in A-6 hereto, lines 4-10, is correct.

No. 6. Error in A-8 hereto, lines 7-11, in granting Clallam County's Motion to Dismiss, rescinding the order of invalidity, and closing the cases.

No. 7. Error in not taking official notice of Clallam County Resolution No. 77, 2007 which is in the record at AR 207-09.

No. 8. Error in not taking official notice of the fact that during the time when the VSP Bill was being drafted and being considered by the legislature, the Growth Board's website erroneously reported that the relevant Growth Board case numbers 00-2-0008 and 01-2-0020 were closed.[13]

III. MAJOR ISSUES BEFORE THE COURT

No. 1. Did the VSP change the statutory law or caselaw regarding substantive requirements to come into compliance with critical areas requirements in RCW 36.70A.060[14] and RCW 36.70A.172(1)[15] for counties not in the Program? (Superior Court ("SC") Errors 1-2; GB Errors 1-7.)

No. 2. If Clallam County regulations can be adopted by a VSP county in compliance with RCW 36.70A.735(1)(b)[16] does the VSP county comply with the Program if it adopts "former" County regulations or only if it adopts "then-current" regulations? (SC Errors 1-2; GB Errors 1-7.)

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[12] *Infra* at 15-16. CCC 27.12.035(7) is the challenged County regulation that exempts preexisting agriculture uses from having to comply with other regulations that protect critical areas.

[13] *See* AR 146-47.

[14] A-11 hereto.

[15] A-12 hereto.

[16] A-16 hereto.

No. 3. Was the Growth Board required to consider compliance of CCC 27.12.035(7)[17] with the critical areas requirements of RCW 36.70A.060 and RCW 36.70A.172(1) considering the remand instructions of Division II and other caselaw independent of the VSP provisions in RCW 36.70A.735(1)(b)? (SC Errors 1-2; GB Errors 1-7.)

No. 4. Did the Growth Board erroneously interpret or apply the law when it decided to grant the County's Motion to Dismiss, lift invalidity, and dismiss the Growth Board cases? (SC Errors 1-2; GB Errors 1-8.)

No. 5. Did RCW 36.70A.710(6)[18] of the VSP require Clallam County to review its preexisting agriculture exemption in CCC 27.12.035(7) and, then if not in compliance with RCW 36.70A.060 and RCW 36.70A.172(1), to bring this regulation into compliance by July 22, 2013? (SC Errors 1-2; GB Errors 1-8.)

No. 6. Should the Growth Board 2012 Order and the Superior Court 2013 Order be reversed? (SC Errors 1-2; GB Errors 1-8.)

IV. STATEMENT OF THE CASE

PPF accepts the facts provided by the Growth Board in the preamble and Background sections of *PPF v. Clallam County*, 00-2-0008 and 01-2-0020 (Order on Motion to Dismiss, December 13, 2012) ("Growth Board 2012 Order"). A full copy of the challenged Growth Board 2012 Order is attached hereto as pages A-1 to A-10.

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[17] *Infra* at 15-16.
[18] A-14 hereto.

Clallam County first adopted former Clallam County Code ("CCC") 27.12.035(7) in 1999.[19] This former agriculture exemption simply exempted "existing and ongoing agriculture activities" from critical area regulation.[20] The Growth Board found this former agriculture exemption to be noncompliant[21] and statutorily invalid[22] in 2000.

In 2001, the County amended former CCC 27.12.035(7) to the current version.[23] The Growth Board 2001 Order found that the County had "not sustained its burden" to lift invalidity on CCC 27.12.035(7) and therefore remained in noncompliance and invalidity.[24]

In 2012, Clallam County brought a new Motion to Dismiss and to Rescind the Order of Invalidity[25] on the 2001 version of CCC 27.12.035(7). The County brought a single argument described by the Growth Board as follows:

> The County focuses on the RCW 36.70A.735(1)(b) option which provides [certain VSP] counties [whose work plan is not approved, fails, or is unfunded] may achieve GMA compliance with the requirement to protect critical areas in areas used for agricultural activities by adopting regulations from one of the four listed counties. As Clallam is one of the four, it takes the position the legislature determined Clallam County regulations are compliant with the GMA.

(Growth Board 2012 Order at A-6 hereto, lines 4-10 and A-5 hereto, lines 1-5 and 15-23.)

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[19] AR 167.
[20] AR 168.
[21] AR 173, Para. 11 and AR 174, Para. 14.
[22] AR 175, Para. 3; AR 176, Para. 2.
[23] AR 149-51 and 152-55.
[24] *Id.*; AR 156, lines 18-19 and 23-24.
[25] AR 15-89.

The County argued that this established that the 2001 (current) version of CCC 27.12.035(7) complied with the GMA requirements in RCW 36.70A.060(2) and RCW 36.70A.172(1).[26] The Growth Board accepted the County interpretation of the GMA, lifted invalidity on CCC 27.12.035(7), and dismissed the Growth Board cases ignoring or rejecting PPF arguments that CCC 27.12.035(7) still did not comply with RCW 36.70A.060 and RCW 36.70A.172(1).[27] In the Argument section of this brief, PPF will demonstrate that the Growth Board's action was based on an erroneous interpretation or application of the law and should be reversed.

V. ARGUMENT

A. Standard Of Review

The Growth Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations. *Swinomish Indian Tribal Community v. Growth Board* ("*Swinomish*"), 161 Wn.2d 415, 423, 166 P.3d 1198 (2007). The Growth Board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record Before the Growth Board and in light of the goals and requirements of the GMA. (*Id.*) An action is "clearly erroneous" if the Growth Board is left with the firm and definite conviction that a mistake has been committed." (*Id.* at 423-24.)

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[26] RP1 at 18, lines 7-10 ("Board Member Carter: Does the County claim that it does meet the requirements of [-.060] on agricultural land to protect critical areas? [Attorney for the County] Mr. Kresovich: Yes"). "RP1 at 18" refers to page 18 in the transcript of the December 3, 2012 Growth Board Hearing that has been provided to the Court with the Administrative Record.

[27] A-8 hereto, lines 1-11.

Comprehensive plans and development regulations under the GMA are presumed valid upon adoption. (*Id.* at 424.) However, that presumption is overcome, and the burden of proof shifts from the petitioner, when such plans or regulations are found to be noncompliant and they are not modified. Although RCW 36.70A.3201 requires the Growth Board to give deference to a county, the county's actions must be consistent with the goals and requirements of the GMA. (*Id.*) A county or city subject to a determination of invalidity made under RCW 36.70A.300 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity (in this case CCC 27.12.035(7)) will no longer substantially interfere with the fulfillment of the goals of the GMA under the standard in RCW 36.70A.302(1). (RCW 36.70A.320(4).)

On appeal, this Court reviews the Growth Board's decision, not the superior court decision affirming it. (*Lewis County v. Growth Board*, 157 Wn.2d 488, 497, 139 P.3d 1096 (2006).) This Court applies the standards of RCW 34.05 directly to the record Before the agency, sitting in the same position as the superior court. (*Id.*) The Growth Board's legal conclusions are reviewed de novo, giving substantial weight to the Growth Board's interpretation of the statute it administers. (*Swinomish* at 424.) This Court should grant relief to PPF if it determines that "The agency has erroneously interpreted or applied the law," or that another standard in RCW 34.05.570(3) is met.

Growth Board deference to counties is limited and Courts should not give deference to counties' interpretations of the GMA:

> deference to counties remains bounded by the goals and requirements of the GMA. The deference boards give is neither unlimited nor does it approximate a rubber stamp. Moreover, when it comes to interpreting the GMA, the same deference to counties does not adhere.

(*Kittitas County v. Eastern Washington Growth Management Hearings Board* ("*Kittitas*"), 172 Wn.2d 144, 156, 256 P.3d 1193 (2011) (punctuation and citations omitted).) There is no deference to be given by the Growth Board or the Court to the County's current agricultural exemption because this regulation was previously found noncompliant and was not modified.

B. Primer On The Growth Management Act

The Growth Management Act ("GMA" - Chapter 36.70A RCW) was adopted in 1990 to have coordinated land use planning to protect the environment, have sustainable economic development, and protect quality of life:

> The legislature finds that uncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic development, and the health, safety, and high quality of life enjoyed by residents of this state.

(RCW 36.70A.010.) The GMA is controversial. It has been amended every year between 1990 and 2013. The GMA has 13 planning goals in RCW 36.70A.020. RCW 36.70A.480(1) made the goals and policies of RCW 90.58.020 (in the Shoreline Management Act) the fourteenth goal of the GMA for shorelines of the state.

In addition to the goals, there are also many requirements in the GMA. Some requirements, like the requirement to have development regulations that protect critical areas pursuant to RCW 36.70A.060 and RCW

36.70A.172(1), applied to all cities and counties in this state (prior to adoption of the VSP). Additional requirements apply only to fully-planning counties and the cities in those counties. (RCW 36.70A.040(1), (2), and (5).) Any county may opt to plan under the GMA, but the fastest growing counties must plan under the GMA. (*Id.*) Clallam County is a fully-planning county.

Each fully-planning county is required to adopt a countywide planning policy under RCW 36.70A.210 after consultation with the cities in the county. (RCW 36.70A.040(3).) The countywide planning policy serves as a framework for the development of comprehensive plans by the county and its cities to ensure consistency between plans. (RCW 36.70A.210(1).)

All counties and cities must designate agricultural, forest, and mineral resource lands and critical areas and then adopt development regulations to conserve these designated resource lands and, except for agricultural areas in VSP counties, to protect these designated critical areas. (RCW 36.70A.060; RCW 36.70A.700 to -760; AR 72-86.) Next, fully-planning counties must establish interim Urban Growth Areas ("UGAs") and take related actions under RCW 36.70A.110. (RCW 36.70A.040.) UGAs are designated areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. (RCW 36.70A.110(1).) Each city must be in an urban growth area. (*Id.*)

Next, fully-planning counties and their cities all must adopt GMA comprehensive plans and adopt GMA development regulations that are consistent with and implement these comprehensive plans. (RCW 36.70A.040(3), (4), and (5).) Basic requirements for comprehensive plans are provided in RCW 36.70A.070. When adopting comprehensive plans, fully-

planning counties and their cities shall review their critical area and resource land designations and development regulations and may alter them to ensure consistency. (RCW 36.70A.060(3).)

Both because of changing circumstances over time and changing provisions of the GMA, periodically fully-planning counties and their cities are required by RCW 36.70A.130 to take legislative action to review and, if needed, revise their comprehensive plans and development regulations to ensure the plans and regulations comply with the requirements of the GMA.

In 2011, VSP legislation was adopted that changed substantive requirements for counties that opted-into the VSP related to protection of critical areas in agricultural areas. The VSP only set one new requirement in the GMA for counties like Clallam County which did not opt-into the VSP to:

> review and, if necessary, revise development regulations adopted under [chapter 36.70A RCW] to protect critical areas as they specifically apply to agricultural activities.

(RCW 36.70A.710(6).) For Clallam the deadline for completing such review and revisions was July 22, 2013. (*Id.*)

There are a number of speciality designations that fully-planning counties may utilize including new fully contained communities described in RCW 36.70A.350, master planned resorts described in RCW 36.70A.360 and -.362, major industrial developments described in RCW 36.70A.365, -.367, and -.368, and national historic towns described in RCW 36.70A.520.

There is no state agency with enforcement authority that is authorized to enforce the GMA on its own initiative. The GMA does establish a Growth Management Hearings Board ("Growth Board") that is authorized to hear and

rule on petitions filed by others. (RCW 36.70A.250 to -.280.) Petitions may challenge non-compliance with the requirements of the GMA (chapter 36.70A RCW), the Shoreline Management Act (chapter 90.58 RCW) as it relates to the adoption of shoreline master programs or amendments thereto, or the State Environmental Policy Act (SEPA; chapter 43.21C RCW) as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW. (RCW 36.70A.280(1)(a).) In addition, petitions may challenge population projections of the Office of Financial Management that are referenced in several GMA statutes including in RCW 36.70A.110(2) to size UGAs. (RCW 36.70A.280(1)(b).) Petitions may also make several challenges related to the VSP. (RCW 36.70A.280(1)(c) to (e).)

There are several procedural requirements that must be met to file a petition with the Growth Board. (RCW 36.70A.280 and -.290.) After a hearing on a petition, the Growth Board issues a final order deciding if there is compliance with regard to challenged issues. (RCW 36.70A.300(1).) If there is a finding of noncompliance on an issue, the Growth Board, if requested, will determine if there should also be a finding of statutory "invalidity." (RCW 36.70A.300(4) and -.302.) A determination of statutory "invalidity" is made if continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of goals of the GMA. (RCW 36.70A.302(1).) A determination of statutory "invalidity" has prospective effect only. (RCW 36.70A.302(2) and (3).) RCW 36.70A.302(6) provides that, "A county or city subject to a determination of invalidity may file a motion requesting that the board clarify, modify, or

rescind the order." RCW 36.70A.330(1) states that a county or city under invalidity may bring a motion requesting a finding of compliance. The Growth Board has the power to recommend that financial sanctions be imposed by the governor. (RCW 36.70A.330(3), -.340, and -.345.)

C. Analysis Of Clallam County's Historic Failure To Comply With The Requirements of RCW 36.70A.060 And RCW 36.70A.172(1) To Protect Wetlands, Streams And Other Habitat Areas From Preexisting Agriculture Activities

The GMA defines "critical areas" ("CAs") to include wetlands, streams and other habitat areas, sensitive aquifer recharge areas, and areas subject to frequent flooding or geologic hazard. RCW 36.70A.030(5). In 1990, the legislature required every city and county in the state to adopt development regulations that protect critical areas:

> Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. . . . . such development regulations shall be adopted on or before March 1, 1992.

(RCW 36.70A.060(2).) In 1995, the legislature required these development regulations to "include the best available science . . . to protect the functions and values of critical areas" and to "give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries" such as salmon fisheries. (RCW 36.70A.172(1).)

Clallam County, like many other cities and counties in this state, adopted development regulations to protect streams, wetlands and other habitat areas by establishing buffer setbacks, that are of varying widths depending on the functions and values of the habitat to be protected, and then by strictly limiting activities within these setbacks. CCC 27.12.200 to -

.325.)[28] Clallam County also adopted development regulations to protect sensitive aquifer recharge areas, and to provide protection in areas subject to frequent flooding or geologic hazard. (CCC 27.12.400 to -.615.)

The subject of this appeal is Clallam County's agricultural exemption from its development regulations that protect critical areas. In 1999, Clallam County exempted "Existing and ongoing agricultural activities . . . on lands designated as critical areas or their associated buffers" from having to comply with all other County development regulations that protect critical areas. (Former CCC 27.12.035(7); AR 185; Ordinance #681.) This exemption was appealed to the Growth Board by Protect the Peninsula's Future ("PPF") and the Washington Environmental Council ("WEC"). The Growth Board found that, "Because of the significant environmental impact of ongoing agricultural activities, the GMA does not allow such activities to be completely exempt." (AR 168.) The Growth Board ruled that this exemption in former CCC 27.12.035(7) did not comply with the requirement of RCW 36.70A.060(2) to have "development regulations that protect critical areas" because the exemption "is not limited to agricultural resource areas, is written too broadly, fails to protect CAs, and does not comply with the GMA." (AR 173-74, Para. 11 and 14).

Because of the significant damage that ongoing agriculture is having on wetlands, stream habitat, and salmon fisheries, the Growth Board also found the agricultural exemption statutorily "invalid" under RCW 36.70A.302 for substantial interference with Goals 10 and/or 14 of the GMA.

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[28] Title 27 CCC is available on the web at http://www.codepublishing.com/WA/clallamcounty.html

(AR 175, Para. 3 and AR 176, Para. 2.) Generally, the Growth Board only finds the most egregious violations of the GMA to be invalid. (*Friends of Skagit County v. Skagit County* ("*Skagit*"), GB case 96-2-0025 (Compliance Hearing Order, August 9, 2000)[29] at 49. "Goal 10" (RCW 36.70A.020(10)) is to "Protect the environment" and "Goal 14" (RCW 90.58.020 pursuant to RCW 36.70A.480(1)) includes direction to protect "the land and its vegetation and wildlife, and the waters of the state and their aquatic life."

The major impact of a finding of statutory "invalidity" in the instant case is that "the County bears the burden of showing that new development regulations (DRs) no longer substantially interfere with the goals of the [GMA]." (AR 151, lines 3-5.) In 2001, the County amended former CCC 27.12.035(7) to the current language which exempts from the scope of other County regulations that protect critical areas "existing and ongoing agriculture" on lands in the open space tax program when some best management practices are employed. This County exemption is granted to:

> Existing and ongoing agriculture that was conducted prior to the effective date of this chapter on lands designated as critical areas or their associated buffers; provided, that such lands are classified as farm and agricultural land pursuant to Chapter 84.34 RCW; provided further, that all activities occurring on such lands employ best management practices (BMPs). For the purposes of this exemption, acceptable BMPs shall include: (a) activities carried out consistent with farm plans issued and authorized by the Natural Resources Conservation Service (NRCS); (b) activities that demonstrate consistency with total maximum daily loads (TMDL) established by the Department of Ecology for specific operations; and/or (c) activities that demonstrate consistency with standard BMPs published by the NRCS, as now or hereafter amended. Written confirmation by the administrating agency that applicable BMPs are being met

[29] This order is on the web at http://www.gmhb.wa.gov/LoadDocument.aspx?did=815

> will constitute evidence of eligibility for this exemption. (See also CCC 27.12.025(7)).

(CCC 27.12.035(7).)

This Clallam County agricultural exemption is discussed by the Growth Board in AR 152-55 where the Growth Board concludes that the County "failed to sustain its burden of proof that its action no longer substantially interferes with the goals of the [GMA]." (AR 154, lines 22-25.) In the briefing that led to this conclusion, PPF and WEC argued for continued invalidity:

> because: 1) the exemption is not limited to agriculture on designated natural resource lands; 2) activities that are exempt are not reasonably regulated using "best available science" with special consideration for anadromous fisheries; 3) adopted best management practices do not consider all habitat functions and values; 4) there is no minimum buffer width; and 5) there is no monitoring program with benchmarks and adaptive management.

(AR 183-84; AR 185-90.) The Growth Board 2001 Order found that the "reduced protection for all properties enrolled in the open space taxation program found in RCW 84.34 substantially interferes with Goal 10 of the [GMA]." (AR 159, Para. 14.)

The Board expressed concern that:

> reduction of CA protections for lots as small as 1 acre is not a proper, nor allowable, balancing of GMA goals. There are many exhibits in this record that demonstrate significant damage to critical areas through ongoing small-scale agricultural practices.

(AR 154, lines 13-16.)

The Growth Board 2001Order, also notes that the County could not meet its duty to have development regulations that protect critical areas by relying on BMPs administered by other agencies "and without an effective monitoring program." (AR 155, lines 1-4.) The problems with relying on

BMPs from other agencies are 1) these agency BMPs are not expressly designed to use "best available science . . . to protect the functions and values of critical areas" giving "special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries" as required for cities and counties by RCW 36.70A.172(1); 2) no County official or body is required to review the BMPs and find that they adequately implement best available science with the required special consideration; 3) the BMPs are not required to protect both water quality needs and habitat needs of fish and may only conserve soils or energy or air quality; 4) volunteered BMPs are allowed that may not protect critical areas at all; 5) farm plans are exempt from public disclosure unless certain conditions are met. Even the County would not be able to see the actual farm plans. With farm plans being secret they are basically unenforceable by the County; and 6) the obligations of the exemption are not clear as to whether just one BMP must be used or whether all relevant BMPs must be used for an activity to be exempt. (*See* AR 187-88.)

But, perhaps even more importantly, the Growth Board noted that there must be an effective monitoring program for the County to be able to use BMPs to protect critical areas and particularly, stream habitat and associated wetlands. (AR 155, lines 1-4.) This requirement was discussed in a 1998 Order of the Growth Board:

> There must be some assurance that CAs and anadromous fish are actually protected. As we said in our recent Shelton decision:
>
> > If BMPs are to be relied upon for protection, some form of monitoring and enforcement must be included to ensure that the BMP plans are actually implemented and followed.
>
> *Advocates for Responsible Development v. City of Shelton*, Case #98-2-0005. BMPs may be voluntary and individually developed, but benchmarks, timeframes and monitoring must be established to ensure that these voluntary BMPs are working to achieve needed protection. There also must be a non-voluntary, fallback approach established to be implemented if the voluntary BMP approach is not working or is too slow in producing required results to protect CAs. All this must be done using BAS.

(*Skagit*, GB case 96-2-0025 (Compliance Hearing Order, September 16, 1998)[30] at 19-20.) In *PPF v. Clallam County*, GB case 00-2-0008 (Final Decision and Order, December 19, 2000) at AR 168, the Growth Board states "CCC 27.12.035(7) exempting "existing and ongoing agricultural activities" suffers from all of the deficiencies pointed out in *Skagit*.

In *Skagit*, Skagit County eventually adopted stream habitat protections that involved both voluntary and mandatory detailed BMPs in the ordinance and Skagit County adopted a monitoring program with baseline data and with an adaptive management program. The Growth Board found compliance for the BMPs but found that there needed to be more specificity in Skagit County's monitoring and adaptive management program. (*Swinomish Indian Tribal Community v. Skagit County* ("*Tribe*"), 02-2-0012c (CO, December 8, 2003)[31] at 3 and at 42-49 and 55-58.) Skagit County added specificity, but the Growth Board still found continued noncompliance for the monitoring and adaptive management program:

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[30] This order is on the web at http://www.gmhb.wa.gov/LoadDocument.aspx?did=818
[31] This order is on the web at http://www.gmhb.wa.gov/LoadDocument.aspx?did=469

> the Board also finds that [Skagit] County's monitoring and adaptive management program does not ensure the protection of the existing functions and values of FWHCAs [stream habitat] in ongoing agricultural lands as required by RCW 36.70A.040, RCW 36.70A.060, and RCW 36.70A.172. [Skagit] County has adopted minimal protective regulations in ongoing agricultural lands which must be buttressed with an adaptive management program to ensure that protection is actually provided. However, [Skagit] County's program fails to provide the needed adaptive management to ensure that its protection measures are, in fact, protecting FWHCAs. Fundamentally, the program lacks benchmarks and triggers for corrective action and the ability to detect the cause of any deterioration in the existing functions and values of FWHCAs in a timely way so that the current protection measures could be adjusted to provide adequate protection of fish habitat.

(*Tribe* (Compliance Order, January 13, 2005)[32] at 2.)

Skagit County appealed but the Growth Board was upheld on this issue by the Supreme Court in *Swinomish Indian Tribal Community v. Growth Board* ("Swinomish"), 161 Wn.2d 415, 434-37, 166 P.3d 1198 (2007). The *Swinomish* Court affirmed that "local governments must either be certain that their critical areas regulations will prevent harm or be prepared to recognize and respond effectively to any unforeseen harm that arises" by having an effective monitoring and adaptive management program. (*Swinomish* at 436.)

In current CCC 27.12.035(7), Clallam County relies on vaguely specified BMPs that provide uncertain protection of critical areas from the impacts of existing and ongoing agriculture. In order to comply with the requirements of RCW 36.70A.060(2) to have development regulations that protect critical areas, the Growth Board and *Swinomish* Court have agreed that there must be an effective water quality and fish habitat monitoring and

[32] This order is on the web at http://www.gmhb.wa.gov/LoadDocument.aspx?did=274

adaptive management program when BMPs are relied upon for critical area protection.

Without an effective monitoring program that includes adaptive management, Clallam County does not know the existing conditions where BMPs are individually implemented and so the adequacy of the protection cannot be assessed, changes detected, and corrective action rapidly taken if necessary. The County has not funded or committed to such a monitoring program for stream habitat and wetlands. This is the reason that the Growth Board 2001 Order, when it found continuing invalidity for CCC 27.12.035(7), notes that compliance for this regulation could not achieved "without an effective monitoring program." (AR 155, lines 1-5.) **Because Clallam County has no monitoring and adaptive management program for critical areas for areas with existing and ongoing agriculture, the caselaw is well established that the County's existing and ongoing agricultural exemption cannot comply with RCW 36.70A.060 and RCW 36.70A.172(1).**

On September 25, 2012, Clallam County, without amending CCC 27.12.035(7), filed a motion with the Growth Board requesting that the 2001 invalidity order on CCC 27.12.035(7) be lifted and compliance with RCW 36.70A.060 and RCW 36.70A.172(1) be found solely because the legislature in 2011 added the VSP to the GMA. (AR 15-22.) The Growth Board erroneously interpreted and applied the VSP when it granted the County's Motion on December 13, 2012, rescinded statutory invalidity, and dismissed and closed the Growth Board cases. (AR 226-35.) PPF will demonstrate that

the VSP was not intended to impact the County's noncompliance with RCW 36.70A.060 and RCW 36.70A.172(1) and so the Growth Board erred when it relied upon the VSP to lift invalidity, ignoring or rejecting PPF arguments that CCC 27.12.035(7) still did not comply with RCW 36.70A.060 and RCW 36.70A.172(1).

D. Primer On The Voluntary Stewardship Program

The County's Motion to Dismiss that led to the challenged Growth Board 2012 Order was based on the County's misinterpretation of the provisions and intent of the Voluntary Stewardship Program ("VSP" or "Program") that was adopted by the legislature in 2011.

The VSP provides an "alternative to protecting critical areas in areas used for agricultural activities through development regulations adopted under RCW 36.70A.060" and RCW 36.70A.172(1). (RCW 36.70A.710(1)(a); AR 76.) The Program is primarily governed by fifteen sections of law from RCW 36.70A.700 to RCW 36.70A.760. (AR 72-86.) It involves: the state conservation commission ("commission") who administers the Program and must develop implementing policies and procedures; a technical panel who works with the commission to review work plans and reports submitted from participating counties; and a statewide advisory committee who works with the commission, recommends priority watersheds, and performs Program reviews. (RCW 36.70A.705(2); AR 74-75.)

The Program requires the state department of commerce to assist the counties in the program and calls for cooperation and collaboration to implement the program between the commission, department of commerce,

department of agriculture, department of fish and wildlife, department of ecology, and other state agencies. (RCW 36.70A.705(3) and (4); AR 75.)

When a county in the Program gets watershed funding, it must designate a watershed group. (RCW 36.70A.715(1); AR 78.) The watershed group must satisfy twelve specific duties including establishing an effective monitoring program, and with collaboration with state agencies, must develop a work plan that must include goals and benchmarks for the protection and enhancement of critical areas in areas used for agricultural activities. (RCW 36.70A.720(1) and (2); AR 78-80.)

If the work plan is approved by the commission, the watershed group will implement the work plan and will provide reports to the commission every five years from receipt of funding regarding whether the benchmarks and goals of the work plan are being met. (RCW 36.70A.720(2); AR 79.) If they are not being met, the group will propose an adaptive management plan. (*Id.*; AR 80) If the adaptive management plan is not approved by the commission or if after ten years the work group concludes that the benchmarks and goals of the work plan are not being met, the County has eighteen months to implement one of the "fall back provisions" in RCW 36.70A.735(1). (RCW 36.70A.720(2)(b) and (c); AR 80; and -735; AR 82.) If the watershed work plan is not approved by the commission by three years after funding, the County will have eighteen months to implement one of the "fall back provisions" in RCW 36.70A.735(1). (RCW 36.70A.725(6); AR 81; and -.735; AR 82).

A county that elects to participate in the Program can elect to withdraw one or more watersheds from the Program after three, five, or eight

years or any time after 10 years all beginning after receipt of funding. (RCW 36.70A.710(7); AR 77.) Upon withdrawal of a watershed from the Program, the County has eighteen months to implement one of the "fall back provisions" in RCW 36.70A.735(1). (RCW 36.70A.710(7); AR 77.)

1. The earliest that a watershed will be subject to the "fall back provisions" in RCW 36.70A.735(1) will be July 15, 2015

Around July 15, 2015 and every two years thereafter, the commission may also remove a watershed from the Program if it determines that funding is inadequate. (RCW 36.70A.740; AR 83-84.) If a watershed is removed from the Program for lack of funds, the county has 18 months to implement one of the "fall back provisions" in RCW 36.70A.735(1). (RCW 36.70A.735(1); AR 82.) Therefore, the earliest that a watershed will be subject to the "fall back provisions" in RCW 36.70A.735(1) will be July 15, 2015 and for any watersheds that are funded the earliest they will be subject to these "fall back provisions" will be significantly later.

2. Not all of the "fall back provisions" in RCW 36.70A.735(1) involve the adoption of development regulations

The "fall back provisions" in RCW 36.70A.735(1) do not all require the adoption of development regulations. (*See* Attachments A-5 and A-6 hereto; AR 82-83.) However, they do give the option of adopting "regulations previously adopted" by Clallam County if the watershed is in a region with similar agricultural activities, geography, and geology. (RCW 36.70A.735(1)(b); AR 82.)

E. Clallam County Is Required To Comply With RCW 36.70A.060 And RCW 36.70A.172(1) Because It Did Not Opt-Into The Voluntary Stewardship Program

From 2007 to 2011, the legislature put a moratorium on making changes to development regulations that were adopted under RCW 36.70A.060 and RCW 36.70A.172(1) to protect critical areas as they apply to agricultural activities. (AR 35-37.) Even though Division II had remanded CCC 27.12.035(7) to the Growth Board, the moratorium prevented the County from amending its regulation before ESHB 1886 went into effect. In 2011, the legislature adopted ESHB 1886 which created the new Voluntary Stewardship Program ("VSP" or "Program") to "Promote **plans** to protect and enhance critical areas within the area where agricultural activities are conducted." (RCW 36.70A.700(2)(a) (emphasis supplied); AR 72.)

1. As an alternative to complying with RCW 36.70A.060 and RCW 36.70A.172(1) to have regulations to protect critical areas in areas used for agricultural activities, counties were allowed to opt-into the Voluntary Stewardship Program

ESHB 1886 created a new option for protecting critical areas in areas used for agricultural activities. For counties that did not choose this new option, ESHB 1886 states that these counties are to continue to "Rely upon RCW 36.70A.060 for the protection of critical areas." (RCW 36.70A.700(2)(c); AR 72.) ESHB 1886 further states:

> As an alternative to protecting critical areas in areas used for agricultural activities through development regulations adopted under RCW 36.70A.060, the legislative authority of a county may elect to protect such critical areas through the program.

(*Supra* at 21; RCW 36.70A.710(1)(a); AR 76.)

Counties who chose to use the Program to protect critical areas in areas used for agricultural activities were required to take legislative action to opt-into the Program by January 22, 2012. (RCW 36.70A.710(1)(b): AR 76.) Clallam County was one of eleven counties who decided not to opt-into the Program.[33] These eleven counties must protect critical areas in areas used for agricultural activities using development regulations that comply with RCW 36.70A.060 and RCW 36.70A.172(1).

2. Because Clallam County did not opt-into the VSP, Clallam County was required to take legislative action to bring CCC 27.12.035(7) into compliance with RCW 36.70A.060 and RCW 36.70A.172(1) by July 22, 2013

The legislature realized that the counties that did not opt-into the VSP might have agricultural critical areas regulations that did not comply with RCW 36.70A.060 and RCW 36.70A.172(1) and so it included a procedural requirement in RCW 36.70A.710(6) that applies to counties that did not opt-into the VSP. If a "county has not elected to participate in the program" it must:

> review and, if necessary, revise development regulations adopted under this chapter to protect critical areas as they specifically apply to agricultural activities.

RCW 36.70A.710(6)(a).

RCW 36.70A.710(6) provides deadlines for completing this required review. For Clallam County, review was required to take place by July 22, 2013. RCW 36.70A.710(6). RCW 36.70A.710(6)(b) provides that certain counties may conduct their required review after July 22, 2013 if these

[33] AR 164. PPF requests official notice be taken of this government publication.

counties completed their last review under RCW 36.70A.130 between July 1, 2003 and June 30, 2007. Clallam County completed its last review on August 28, 2007 and so it was not legally able to postpone its deadline to review and revise its Agricultural Exemption beyond July 22, 2013.[34]

Clallam County has not yet conducted the review required by RCW 36.70A.710(6). This is likely because of the challenged Growth Board 2012 Order granting the County's Motion to Dismiss. Nevertheless, the intent of RCW 36.70A.710(6) is to require Clallam County, and all other counties that did not opt-into the VSP, to bring their Agricultural Critical Areas Regulations into compliance with RCW 36.70A.060 and RCW 36.70A.172(2) by an established deadline.

3. This Court should reject the County's argument that because the County is one of the four listed counties in RCW 36.70A.735(1)(b)(i), then the legislature determined Clallam County regulations are compliant with the GMA

This Court should reject the County's argument that because the County is one of the four listed counties in RCW 36.70A.735(1)(b)(i), then the legislature determined Clallam County regulations are compliant with the GMA. (*See supra* at 6; A-6 hereto, lines 4-10.) This Court should also find that the Growth Board misinterpreted and misapplied the law when the Growth Board accepted this interpretation, granted the County Motion to Dismiss, rescinded invalidity, and dismissed cases 00-2-0008 and 01-2-0020.

The County brought a single argument in its Motion to Dismiss Before the Growth Board:

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[34] *See* Resolution No. 77, 2007 (AR 207-9). PPF requests official notice of this Resolution.

> The plain meaning of the amendments to the GMA creating the voluntary stewardship program establishes Clallam County's compliance with the GMA. The legislature selected Clallam County as one of the four designated, model counties. RCW 36.70A.735(1)(b). The express reference to Clallam County reveals the legislature's intent to validate Clallam County's critical area regulations. "If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The language is unambiguous and there is only one possible interpretation of the legislature's explicit reference to Clallam County; the legislature has determined that Clallam County's critical areas regulations on agricultural activities comply with the GMA. *Id.*

(AR 20.)

The VSP "fall back provisions," in RCW 36.70A.735(1)(b) allow a similarly-situated county whose work plan is not approved, fails, or is unfunded to comply with the Program if it adopts "regulations previously adopted" from Clallam County:

> [If its work plan is not approved, fails, or is unfunded, then within 18 months], a county must:
> (a) Develop, adopt, and implement a watershed work plan . . . .
> (b) Adopt development **regulations previously adopted** under [Ch. 36.70A RCW] by another local government for the purpose of protecting critical areas in areas used for agricultural activities. Regulations adopted under this subsection (1)(b) must be from a region with similar agricultural activities, geography, and geology and must: (i) Be **from Clallam, Clark, King, or Whatcom** counties; . . . .
> (c) Adopt development regulations certified by the department . . . . ; or
> (d) Review and, if necessary, revise development regulations [previously adopted].

(RCW 36.70A.735(1) (emphasis supplied); AR 82-83.)

The County claims the plain meaning in RCW 36.70A.735(1)(b) is that the legislature found that the current Agricultural Critical Areas

Regulations of Clallam County and three other counties must comply with the GMA. (*Supra* at 27.) The County misinterprets the law.

4. **The plain meaning of RCW 36.70A.735(1)(b) and related statutes is that the current Clallam agricultural exemption must be brought into compliance with RCW 36.70A.060(2) and the then--current Agricultural Critical Areas Regulations may be adopted under RCW 36.70A.735(1)(b)**

"If the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." (*Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).) The plain "meaning is discerned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question. (*Id.* at 9-12.) Therefore, to determine the plain meaning of RCW 36.70A.735(1)(b) we must consider what the legislature said in RCW 36.70A.710(6). (*See supra* at 25-26.)

In RCW 36.70A.710(6) the legislature required **all** counties that did not opt-into the Program to review their existing Agricultural Critical Areas Regulations and required all such counties to bring these regulations into compliance with the GMA if there were issues of noncompliance. The legislature did not exclude the counties listed in RCW 36.70A.735(1)(b)[35] from this requirement in RCW 36.70A.710(6) to review and revise these regulations. The legislature should be presumed to not require Clallam, Clark, King, and Whatcom to do a useless act. (*Guinness v. State*, 40 Wn.2d 677, 689, 246 P.2d 433 (1952).) Therefore, this Court should conclude that the legislature did not conclude that the current Agricultural Critical Areas

[35] Clallam, Clark, King, and Whatcom.

Regulations of Clallam County and the three other listed counties were necessarily already in compliance with the GMA.

The legislature required Clallam County to review its Agricultural Critical Areas Regulations by July 22, 2013 and revise these regulations by July 22, 2013, if necessary to achieve compliance with RCW 36.70A.060 and RCW 36.70A.172(1). (*Supra* at 25-26.) After the County completes its required update, a party may challenge Clallam County's failure to revise aspects of its Agricultural Critical Areas Regulations. (*See Thurston County v. Growth Board*, 164 Wn.2d 329, 343-45, 190 P.3d 38 (2005).)

F. The Parties Agree That If Clallam Regulations Can Be Adopted By A VSP County In Compliance With RCW 36.70A.735(1)(b), The Clallam Agricultural Critical Areas Regulations Adopted Must Be "Then-Current" Clallam Regulations But Not "Former" Regulations

Before the Growth Board, PPF argued that while the "fall back provisions" in RCW 36.70A.735(1) may allow a VSP county to ultimately adopt "regulations previously adopted" by Clallam County pursuant to RCW 36.70A.735(1)(b)(i), the only Clallam regulations that could be adopted would be the "then-current" Clallam regulations. (RP1 at page 36, line 22 to page 37, line 5; RP1 at 41-49.) Any other interpretation creates absurd results. The County agrees with the PPF interpretation. (RP2 at 38,[36] lines 6-7 ("[Attorney for the County] Ms. Golden: The County doesn't disagree that it's the then-current regulation").)

The County adopted its first version agricultural exemption in former CCC 27.12.035(7). The County adopted its second version agricultural

[36] "RP2 at 38" refers to page 38 in the Verbatim Report of Proceedings of the Superior Court hearing on August 14, 2013 that has been provided to the Court.

exemption in CCC 27.12.035(7). In the future, the County may decide to amend CCC 27.12.035(7) with its third version agricultural exemption in order to comply with the GMA.

Under the interpretation that "regulations previously adopted" only include "then-current" but not "former" regulations, the VSP county adopting Clallam Agricultural Critical Areas regulations when the second version was in effect would only be able to adopt this second version. To interpret "regulations previously adopted" to include "former" regulations would allow the VSP county to adopt former CCC 27.12.035(7). This would lead to an absurd result. As the Growth Board points out in the challenged Growth Board 2012 Order, interpretations of legislative intent are to avoid absurd results. (A-8, lines 1-3 and Note 18.)

Former CCC 27.12.035(7) exempted all preexisting and ongoing agricultural activities with no protection of critical areas and no monitoring. (*Supra*, this brief at 14.) Given the ruling in *Clallam County v. Growth Board* at 140 that "preexisting agricultural uses are not exempt from all critical areas regulation" this regulation does not comply with the GMA.[37] "Regulations previously adopted" should not be interpreted to allow VSP counties to adopt "former" regulations that likely do not comply with the GMA.

This same analysis applies to require a VSP county adopting Clallam regulations to adopt the third version when this version provides the "then-current" regulations in Clallam County. As stated above this third version

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[37] *Supra* at 2.

was created to comply with the GMA. The second version would then be "former" regulations that likely do not comply with the GMA. Again, "regulations previously adopted" should not be interpreted to allow VSP counties to adopt "former" regulations that likely do not comply with the GMA.

Therefore, PPF requests that this Court rule that the term "regulations previously adopted" in RCW 36.70A.735(1)(b) does not include "former" regulations, but instead is limited to "then-current" regulations. RCW 36.70A.710(6) directs that the four listed counties review their Agricultural Critical Areas Regulations and revise if necessary to achieve GMA compliance. Any revised regulations will become the "then-current" regulations that could be adopted pursuant to RCW 36.70A.735(1)(b). If a Growth Board, Court or the GMA requires or the County desires further amendments, any further revised regulations will become the "then-current" regulations that could be adopted pursuant to RCW 36.70A.735(1)(b).

The fact that other counties may be able to adopt amended regulations of Clallam, Clark, King, or Whatcom counties, should highlight that people interested in this issue should participate in such regulation amendment processes for these four counties to better ensure that such amended regulations do comply with the GMA.

G. The County Has Not Brought Forth Any Evidence Since 2001 That CCC 27.12.035(7) Complies With RCW 36.70A.060 and RCW 36.70A.172(1)

After Division II reviewed CCC 27.12.035(7) in 2005, it ruled that in order for a Clallam County agriculture exemption that exempts small farms

to comply with RCW 36.70A.060 and RCW 36.70A.172(1) the County must show:

> that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife.

(*Supra* at 2; *Clallam County v. Growth Board*, 130 Wn.App. 127, 140, 121 P.3d 764 (2005), *review denied*, 163 Wn.2d 1053 (2008).) Now, nine years later, the County has still made no such showing for its agriculture exemption.

Thirteen years ago, in the Growth Board 2001 Order that found continuing invalidity for CCC 27.12.035(7), the Growth Board held that:

> reduction of CA protections for lots as small as 1 acre is not a proper, nor allowable, balancing of GMA goals. There are many exhibits in this record that demonstrate significant damage to critical areas through ongoing small-scale agricultural practices

(*Supra* at 16.) The Growth Board 2001 Order also notes that there cannot be compliance with RCW 36.70A.060 and RCW 36.70A.172(1) "by merely acknowledging filing of BMPs with other agencies and without an effective monitoring program." (*Supra* at 16; AR 155, lines 1-4.) Earlier in this brief, PPF argued:

> Because Clallam County has no monitoring and adaptive management program for critical areas for areas with existing and ongoing agriculture, the caselaw is well established that the County's existing and ongoing agricultural exemption cannot comply with RCW 36.70A.060 and RCW 36.70A.172(1).

(*Supra* at 16-20.) The County has not amended CCC 27.12.035(7) to require County review of applied BMPs or to require an effective monitoring and adaptive management program. The County does not claim otherwise.

Based on the Growth Board and Court caselaw described above, the Growth Board, in a compliance hearing, should find CCC 27.12.035(7) in continued noncompliance with RCW 36.70A.060 and RCW 36.70A.172(1) and in continued invalidity. PPF requests that this Court reverse the Growth Board 2012 Order and the Superior Court 2013 Order, reinstate Growth Board Cases 00-2-0008 and 01-2-0020, reinstate noncompliance and invalidity on CCC 27.12.035(7), and remand to the Growth Board with instructions to expeditiously set a new compliance hearing on CCC 27.12.035(7) or on a replacement regulation.

H. Errors In The Growth Board 2012 Order

PPF identifies eight errors in the Growth Board 2012 Order:

No. 1. Error in finding in A-4 hereto, lines 24-27 and Note 11, that the VSP established an alternative method for counties to comply with RCW 36.70A.060

The Growth Board 2012 Order erroneously states:

> The County's Motion to Dismiss is grounded in the VSP, a program which established an alternative method for counties to comply with [RCW 36.70A.060].

(A-4 hereto, lines 24-27 and Note 11.) The VSP legislation states:

> As an alternative to protecting critical areas in areas used for agricultural activities through development regulations adopted under RCW 36.70A.060, the legislative authority of a county may elect to protect such critical areas through the program.

(RCW 36.70A.710(1)(a).) Therefore, the VSP provides an alternative method for VSP counties to comply with the GMA but not an alternative method to comply with RCW 36.70A.060 and RCW 36.70A.172(1). The statement to the contrary in the Growth Board 2012 Order is erroneous.

When a VSP county adopts Clallam "then-current" regulations pursuant to the "fall back provisions" in RCW 36.70A.735(1)(b), this VSP county is not required to have regulations that comply with RCW 36.70A.060 and RCW 36.70A.172(1). This VSP county is only required to comply with the Program requirements. RCW 36.70A.735(1)(b) in the Program does not require compliance with RCW 36.70A.060 and RCW 36.70A.172(1).

Compliance with RCW 36.70A.735(1)(b) is an option for qualified counties that opted-into the VSP. Because Clallam County did not opt-into the VSP, it is subjected to the more protective standards in RCW 36.70A.060 and RCW 36.70A.172(1). Compliance with RCW 36.70A.735(1)(b) does not necessarily mean there is compliance with RCW 36.70A.060 and RCW 36.70A.172(1).

The County argument that because VSP counties can adopt Clallam regulations, therefore Clallam regulations must comply with the GMA and therefore Clallam does not have to show compliance with RCW 36.70A.060 and RCW 36.70A.172(1) short circuits the intent of the VSP and the GMA. The pressure is on Clallam and the other listed counties to actually comply with RCW 36.70A.060 and RCW 36.70A.172(1) so that when VSP counties implement RCW 36.70A.735(1)(b), those VSP counties are more likely to adequately protect critical areas in areas of agricultural activity.

No. 2. <u>Error in finding in A-7 hereto, lines 18-20, that the legislature concluded that the existing development regulations of Clallam County were necessarily sufficiently protective of critical areas in areas used for agriculture</u>

The Growth Board 2012 Order erroneously states:

> Clearly, the legislature concluded the development regulations of those four counties were sufficiently protective of critical areas in areas used for agriculture.

(A-7 hereto, lines 18-20.) The legislature directed these four counties to review and revise their current regulations to come into compliance with the GMA. (RCW 36.70A.710(6).) Therefore the legislature was not sure that the current regulations were in compliance with the GMA but clearly hoped that they would be in compliance with RCW 36.70A.060 and RCW 36.70A.172(1) before any VSP county would be authorized to adopt them.

No. 3. Error in finding in A-7 hereto, lines 8-12, that "fall back" provisions in RCW 36.70A.735(1) "require the county to adopt development regulations to protect critical areas, just as RCW 36.70A.060 does"

The Growth Board 2012 Order erroneously states:

> [The County's argument] is more compelling. RCW 36.70A.735(1) establishes "fall back" alternatives for counties when their VSP work plans are not approved, fail or are unfunded. When that occurs, those "fall back" provisions require the county to adopt development regulations to protect critical areas, just as RCW 36.70A.060 does.

(A-7 hereto, lines 8-12.) The County's single argument Before the Growth Board is a misinterpretation and misapplication of the law and should not have been found more compelling. (*See* discussion under Error No. 2.) Not all of the "fall back" provisions require adoption of development regulations. (*See* RCW 36.70A.735(1)(a).) Development regulations adopted under RCW 36.70A.735(1)(b) are not required to comply with RCW 36.70A.060 and so they have a different standard, less protective of critical areas, than regulations required to comply with RCW 36.70A.060. The Growth Board errs when it considers one just like the other.

No. 4. Error in finding in A-7 hereto, lines 21-31, that there was a realistic potential of an absurd result that another county leaving the VSP would be allowed to adopt CCC 27.12.035(7) when Clallam County was not allowed to rely on CCC 27.12.035(7)

The Growth Board 2012 Order (A-7 hereto, lines 21-31) proposes a hypothetical that assumes that VSP counties can adopt "former" regulations. This leads to an absurd result. This is the reason that the parties support the "then-current" interpretation of "regulations previously adopted" in RCW 36.70A.735(1)(b). Under the "then-current" interpretation, after Clallam adopts an amended regulation, that regulation becomes the "then-current" regulation that a VSP county can adopt. The VSP county would not be allowed to adopt Clallam's prior regulation because that regulation would then be a "former" regulation.

No. 5. Error in finding in A-8 hereto, lines 4-6, that the Clallam County interpretation presented in A-6 hereto, lines 4-10, is correct

The Growth Board 2012 Order (A-8 hereto, lines 4-6) misinterprets and misapplies the law when it finds that the County interpretation of the law described in A-6 hereto, lines 4-10, is the appropriate one because when RCW 36.70A.710(6) is considered to determine the plain meaning of RCW 36.70A.735(1)(b) it should be concluded that the legislature was not sure that the current regulations of the four listed counties were in compliance with the GMA. (*Supra* at 34-35.)

No. 6. Error in A-8 hereto, lines 7-11, in granting Clallam County's Motion to Dismiss, rescinding the order of invalidity, and closing the cases

The Growth Board 2012 Order (A-8 hereto, lines 7-11) grants the County's Motion to Dismiss, rescinds invalidity and closes GB cases 00-2-0008 and 01-2-0020 based on the misinterpretations and misapplications of law that are presented in this brief.

No. 7. Error in not taking official notice of Clallam County Resolution No. 77, 2007 which is in the record at AR 207-09

The Growth Board 2012 Order errs when the Board refused to take official notice of Resolution No. 77,2007 (AR 207-09) as was requested at the Motion hearing. (RP1 at 7-11.) This Resolution is relevant to show that the legislature intended the County to bring its Agricultural Critical Areas Regulations into compliance with RCW 36.70A.060 and RCW 36.70A.172(1) by July 22, 2013 approximately two years before any VSP county would have been able to adopt the Clallam regulations. Under PPF's "then-current" interpretation describing which "previously adopted regulations" can be adopted by a VSP county under RCW 36.70A.735(1)(b), if the County brought CCC 27.12.035(7) into compliance within those two years, the VSP county would adopt the complaint regulation and avoid the absurd result postulated by the Growth Board 2012 Order at A-7 hereto, lines 21-31. In note 34 (supra at 26), PPF requests this Court to take official notice of the County Resolution provided in AR 207-09.

No. 8. Error in not taking official notice of the fact that during the time when the VSP Bill was being drafted and being considered by the legislature, the Growth Board's website erroneously reported that the relevant Growth Board case numbers 00-2-0008 and 01-2-0020 were closed

AR 146-47 are two screen shots of official business records of the Growth Board that were downloaded by the Administrative Manager for the Environmental and Land Use Hearings Office where the Growth Board gets administrative staffing. (*See* AR 144-45). These screen shots show that from March 23, 2010 to July 25, 2012 which was all of the time that the VSP legislation was being drafted and considered by the legislature, the Growth Board website showed the two relevant Growth Board cases were closed. A Growth Board case is closed when compliance is achieved. Therefore, anyone looking at the Growth Board website during this time period to check the status of the Clallam Agricultural Exemption would have concluded incorrectly that this Exemption had been found in compliance with the GMA. This error by the Growth Board may have been the reason that Clallam was included as one of the four listed counties in RCW 36.70A.735(1)(b) even though its Exemption was in noncompliance and under invalidity during all of this time period.

On October 22, 2012, PPF originally requested these screen shots be included in the record as supplemental evidence as Exhibit 1031 as part of the Declaration of Paulette Yorke. (AR 118-19.) On November 13, 2012, the Growth Board refused the Declaration as supplemental evidence. (AR 213-14.) However, the County did not object to the screen shots being in the record. So, on November 23, 2013 and again at the Motion hearing on

December 3, 2012, PPF requested that the Board take official notice of the screen shots without the Declaration. (RP1 at 4.) The Growth Board 2012 Order addresses this request in a section on Preliminary Matters on A-4 hereto. It states that the presiding officer decided this issue on November 13, 2012 and it could not be reconsidered. (A-4 hereto.) But the presiding officer could not have decided PPF's request for official notice that was first requested on November 23, 2012 when the presiding officer issued his Order on Motion to Supplement on November 13, 2012. On November 13, 2012 the request had not yet been made. PPF addresses this error because this Court may wish to know about this Growth Board administrative error that may be the reason that Clallam was included in RCW 36.70A.735(1)(b) when its regulation was noncompliant and under invalidity.

I. Major Issues Before The Court

No. 1. Did the VSP change the statutory law or caselaw regarding substantive requirements to come into compliance with critical areas requirements in RCW 36.70A.060 and RCW 36.70A.172(1) for counties not in the Program?

For counties not in the Program, including Clallam County, the VSP legislation only added one procedural requirement and no substantive requirements. Pursuant to RCW 36.70A.710(6), the County was required to review and, if noncompliant, revise CCC 27.12.035(7) by July 22, 2013. Counties that are not in the VSP, must continue to have Agricultural Critical Areas Regulations that are required to comply with RCW 36.70A.060 and RCW 36.70A.172(1). (*Supra* at 24-25.) Because the legislature required the four listed counties to review and revise their Agricultural Critical Areas Regulations pursuant to RCW 36.70A.710(6), this Court should conclude that

the legislature did not find that the current Agricultural Critical Areas Regulations of Clallam and the three other listed counties were necessarily already in compliance with the GMA. (*Supra* at 28-29.)

No. 2. <u>If Clallam County regulations can be adopted by a VSP county in compliance with RCW 36.70A.735(1)(b) does the VSP county comply with the Program if it adopts "former" County regulations or only if it adopts "then-current" regulations?</u>

The parties agree that VSP counties cannot adopt "former" regulations but can only adopt "then-current" regulations when they adopt Agricultural Critical Areas Regulations under RCW 36.70A.735(1)(b). (*Supra* at 29-31.) This Court should agree with the parties to avoid absurd results. (*Id.*)

No. 3. <u>Was the Growth Board required to consider compliance of CCC 27.12.035(7) with the critical areas requirements of RCW 36.70A.060 and RCW 36.70A.172(1) considering the remand instructions of Division II and other caselaw independent of the VSP provisions in RCW 36.70A.735(1)(b)?</u>

Except for the procedural requirement in RCW 36.70A.710(6) that requires the County to review and revise its Agricultural Critical Areas Regulations, no part of the VSP program changes the requirements that CCC 27.12.035(7) must comply with RCW 36.70A.060 and RCW 36.70A.172(1) as those statues have been interpreted by caselaw. Particularly important are the requirements established by Division II in *Clallam County v. Growth Board*, 130 Wn.App. 127, 140, 121 P.3d 764 (2005), *review denied*, 163 Wn.2d 1053 (2008).

No. 4. Did the Growth Board erroneously interpret or apply the law when it decided to grant the County's Motion to Dismiss, lift invalidity, and dismiss the Growth Board cases?

The Growth Board misinterpreted and misapplied the law when it concluded that listing of Clallam County in RCW 36.70A.735(1)(b) means that the legislature determined that Clallam County regulations were already in compliance with the GMA and then based on this misinterpretation and misapplication granted the County's Motion to Dismiss, lifted invalidity, and dismissed the Growth Board cases. The legislature would not have required Clallam County and the other three listed counties to review and revise their Agricultural Critical Areas Regulations if the legislature had found that their current regulations were necessarily already in compliance with the GMA. (*Supra* at 28-29.)

No. 5. Did RCW 36.70A.710(6) of the VSP require Clallam County to review its preexisting agriculture exemption in CCC 27.12.035(7) and, then if not in compliance with RCW 36.70A.060 and RCW 36.70A.172(1), to bring this regulation into compliance by July 22, 2013?

Yes. (*Supra* at 25-26.)

No. 6. Should the Growth Board 2012 Order and the Superior Court 2013 Order be reversed?

Because the Growth Board misinterpreted and misapplied the law when it issued the Growth Board 2012 Order granting the County Motion to Dismiss and because there is no valid basis in the record for finding CCC 27.12.035(7) in compliance with RCW 36.70A.060 and RCW 36.70A.172(1), PPF requests this Court to reverse the Growth Board 2012 Order and the Superior Court 2013 Order, to reinstate GB cases 00-2-0008

and 01-2-0020, reinstate noncompliance and invalidity on CCC 27.12.035(7), and to remand to the Growth Board with instructions to expeditiously set a new compliance hearing on CCC 27.12.035(7) or on a replacement regulation adopted by the County to come into compliance with the GMA.

On August 10, 2012, the Growth Board, on motion of PPF, set a January 24, 2013 date for the County to come into compliance with RCW 36.70A.060 and RCW 36.70A.172(1) for the protection of critical areas in areas used for agricultural activities. (A-4, lines 3-7.) When this Court reverses the challenged Orders, it should direct that the Growth Board expeditiously set a new compliance date for the County to come into compliance with RCW 36.70A.060 and RCW 36.70A.172(1).

J. Clallam County Is Required By RCW 36.70A.700(2)(c) To Actually Comply With RCW 36.70A.060 And The Growth Board Was Unable To Determine Whether Clallam County Was In Compliance

Certainly the legislature wants Clallam County to come into actual compliance with RCW 36.70A.060 and RCW 36.70A.172(1). It is significant to note that the Order on A-8 (or elsewhere) does not actually state that the County is in actual compliance with RCW 36.70A.060 and RCW 36.70A.172(1). The Concurrence on A-9 expresses concern that "**the Board was unable to determine whether Clallam County was in compliance.**" The Concurrence states that,

> Without hearing from the County whether it completed the BAS [Best Available Science] work and "tailored the exemption," the Board could not determine GMA compliance.

(A-9 hereto, line 21, to A-10 hereto, line 3.) PPF asserts that if the Board was not able to determine GMA compliance, then it erroneously interprets and

applies the law when it dismisses the GB cases. This is particularly true because it is the County that has the burden of proof to show that invalidity should be lifted on its Ordinance. There is no presumption that CCC 27.12.035(7) is valid under RCW 36.70A.320 because the Board had already found that this same regulation was invalid and noncompliant. (*Supra* at 8-9.)

K. The Growth Board Did Not Apply The Correct Burdens Of Proof When It Considered The County's Motion To Dismiss

The Growth Board did not apply the correct burdens of proof when it considered the County's Motion to Dismiss. (*Supra* at 8-9.) This Court should find that the standard in RCW 35.04.570(3)(c) is met to grant relief to PPF. Because CCC 27.12.035(7) had already been found invalid and noncompliant and because it was not modified, the County had the burden of proof both in lifting invalidity and in finding compliance.

L. The Growth Board Erroneously Concludes That The Legislature Intended To Force The Growth Board To Find That CCC 27.12.035(7) Satisfies RCW 36.70A.060(2)

With error in interpreting and applying the statutes that is discussed in the previous subsections, the Growth Board erroneously concludes that the legislature intended to force the Growth Board to find that the current version of CCC 27.12.035(7) satisfies RCW 36.70A.060 and RCW 36.70A.172(1). The Growth Board reasons that if the Program is an alternative method to achieve compliance with RCW 36.70A.060 and RCW 36.70A.172(1), then inclusion of the Clallam County regulations in RCW 36.70A.735(1)(b) must mean that these Clallam County regulations comply with RCW 36.70A.060 and RCW 36.70A.172(1). This leads to the Growth Board's ultimate conclusion in the challenged Order that the current version of CCC

27.12.035(7) must satisfy RCW 36.70A.060 and RCW 36.70A.172(1) such that the GB cases must be dismissed. (Attachments A-4 to A-8.)

The correct legal interpretation of the Voluntary Stewardship Program is that the Program is a way to protect and enhance the environment and critical areas subjected to agricultural activities without having to meet the more strict and burdensome requirements of RCW 36.70A.060(2) and RCW 36.70A.172(1) as these requirements have been established by caselaw.

Using this correct legal interpretation, this Court should interpret the options in RCW 36.70A.735(1) as options that comply with the Program but do not necessarily comply with RCW 36.70A.060 and RCW 36.70A.172(1). Under this correct legal interpretation, the option of adopting the Clallam County regulations in RCW 36.70A.735(1)(b) does not necessarily mean that there will be compliance with RCW 36.70A.060 and RCW 36.70A.172(1) and so it does not necessarily mean that the Clallam County regulations now comply with RCW 36.70A.060 and RCW 36.70A.172(1). The County and the Growth Board ignore the explicit language in the Program that states that the Program provides an alternative to complying with RCW 36.70A.060. (RCW 36.70A.710(1)(a).)

Whether the current Clallam County regulations now comply with RCW 36.70A.060 and RCW 36.70A.172(1) is, at least initially before Court review, up to the sound discretion of the Growth Board without any influence from the statutes that only apply to VSP counties. Based on the analysis provided (*supra* at 13-21 and 31-33), current CCC 27.12.035(7) cannot possibly comply with RCW 36.70A.060 and RCW 36.70A.172(1) as interpreted by caselaw from the Growth Board and Courts.

Because, prior to issuance of the challenged Order, the Growth Board found the current version of CCC 27.12.035(7) both noncompliant with RCW 36.70A.060 and invalid for substantial interference with Goal 10, then when the undue influence from the statutes in the Voluntary Stewardship Program is eliminated, the Growth Board errs when it does not deny the County Motion to Dismiss and find continued noncompliance with RCW 36.70A.060 and continued invalidity.

When the County adopts a new version of CCC 27.12.035(7) or eliminates this regulation altogether, then the Growth Board can exercise its discretion without consideration of the statutes that govern the Voluntary Stewardship Program. A legally coherent decision results from consideration of the guidance from Division II in *Clallam County v. Growth Board* at 140, with the guidance in AR 152-55, with the guidance from *Swinomish* at 431-37, and in consideration of the prior caselaw that interprets the requirements of RCW 36.70A.060 and RCW 36.70A.172(1) to protect critical areas with development regulations.

M. This Court Should Find That The Provisions Of The Program Should Not Impact The Board's Independent Determination Of Compliance With RCW 36.70A.060 For A County Not In The Program

This Court should find that the 2011 legislative action adopting the Voluntary Stewardship Program does not impact the Board's independent determinations of compliance with RCW 36.70A.060 for a county that does not elect to participate in the Voluntary Stewardship Program.

VI. REQUEST FOR RELIEF

PPF requests relief as follows:

1. Reverse the Growth Board 2012 Order and the Superior Court 2013 Order, reinstate Growth Board Cases 00-2-0008 and 01-2-0020, reinstate noncompliance and invalidity on CCC 27.12.035(7), and remand to the Growth Board with instructions to expeditiously set a new compliance hearing on CCC 27.12.035(7) or on a replacement regulation;

2. Rule that the phrase "regulations previously adopted" in RCW 36.70A.735(1)(b) does not include "former regulations previously adopted."

3. Find that the Voluntary Stewardship Program does not substantively impact the Growth Board's independent determinations of compliance with RCW 36.70A.060 and RCW 36.70A.172(1) for areas with agricultural activity for a county that did not elect to participate in the Voluntary Stewardship Program.

4. Take notice that during the time when the bill language in ESHB 1886 was being drafted and being considered by the legislature, the Growth Board's website erroneously stated that Growth Board Case Nos. 00-2-0008 and 01-2-0020 were closed.

5. Award statutory attorney's fees and costs to PPF; and

6. Provide such other relief as the Court may deem proper.

VII. CONCLUSION

Clallam County's agricultural exemption in CCC 27.12.035(7) was found noncompliant with RCW 36.70A.060 and statutorily invalid in 2001 and the County has not modified that regulation to come into compliance with the GMA for the last 13 years. It is understandable that the Growth

Board wants to dismiss these GB cases that have taken it so long to process without any success. But the Growth Board cannot be allowed to dismiss these cases by erroneously interpreting and applying the law. Not only will the protection of fish and wildlife habitat in Clallam County suffer from the Growth Board's errors in the challenged Order, but these errors make it possible that other counties will adopt Clallam's ineffective regulations and those counties' protection of fish and wildlife habitat will suffer.

Because the Growth Board has erroneously interpreted and applied the relevant statutes, this Court should give PPF the relief it requests and clarify to the Growth Board and the County that any agricultural exemption for the County must actually comply with the requirements of RCW 36.70A.060 and RCW 36.70A.172(1) in consideration of the caselaw of the Growth Board and Courts.

This Court should clarify that the compliance requirements for county watersheds in the Program are different from the compliance requirements for county watersheds not in the Program with respect to areas of agricultural activity, and that development regulations that comply with RCW 36.70A.735(1)(b) do not necessarily comply with RCW 36.70A.060 and RCW 36.70A.172(1). The legislature was clear that these two programs are alternatives and that they have different methodologies and requirements.

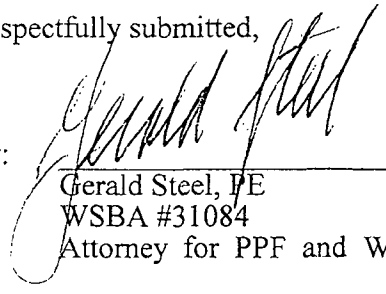
To achieve compliance with RCW 36.70A.060 and RCW 36.70A.172(1), counties may not rely upon methods or regulations that would be compliant if those counties had elected to be in the Program. Legal determinations of compliance with RCW 36.70A.060 and RCW 36.70A.172(1) should not be influenced by laws that just apply to counties

in the Program. The legislature made it clear that the two alternatives are independent, each with different requirements.

PPF requests that this Court reverse the Growth Board 2012 Order and the Superior Court 2013 Order, reinstate Growth Board Case Numbers 00-2-0008 and 01-2-0020, reinstate the noncompliance and invalidity on CCC 27.12.035(7) that existed before the Growth Board 2012 Order was issued and direct the Growth Board to expeditiously set a new compliance hearing to bring the County's regulations that protect critical areas in areas of preexisting and ongoing agricultural into compliance with RCW 36.70A.060 and RCW 36.70A.172(1).

Dated this 10th day of March, 2014.

Respectfully submitted,

By: 

Gerald Steel, PE
WSBA #31084
Attorney for PPF and WEC

DECLARATION OF SERVICE

I, GERALD STEEL, under penalty of perjury under the laws of the State of Washington declare as follows: I am the attorney for Appellant. On March 10, 2014, I caused:

1. Brief of Appellant

to be served by email and first class mail postage prepaid to:

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Dated this 10th day of March, 2014, at Olympia, Washington.

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Attorney for PPF and WEC

APPENDIX INDEX

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD

WESTERN WASHINGTON REGION

STATE OF WASHINGTON

PROTECT THE PENINSULA'S FUTURE AND WASHINGTON ENVIRONMENTAL COUNCIL Petitioners, v. CLALLAM COUNTY, Respondent.	**Case Nos. 00-2-0008 and 01-2-0020** **ORDER ON MOTION TO DISMISS**

This matter comes before the Board pursuant to a Motion to Dismiss filed by Clallam County (County).[1] Protect the Peninsula's Future (PPF) filed a response on October 22, 2012.[2] The Washington Environmental Council was not a party to the motion. Oral argument on the motion took place telephonically on December 3, 2012. The County was represented by George A. Kresovich and Gerald Steel represented PPF. Board members Nina Carter, Chuck Mosher and William Roehl were present with Mr. Roehl presiding.

I. BACKGROUND

These two consolidated cases have a lengthy history, one which began in 1999. Clallam County adopted a critical areas ordinance on December 28, 1999 leading to the filing of a Petition for Review (PFR) (Case No. 00-2-0008). The Board's December 19, 2000 Final Decision and Order (FDO) found parts of the challenged ordinance failed to comply with the GMA and imposed invalidity. Subsequent County legislation intended to achieve compliance led to the filing of a second PFR (Case No. 01-2-0020). The two cases were consolidated.

[1] Clallam County's Motion to Dismiss and to Rescind the Order of Invalidity, filed September 25, 2012

[2] PPF Response to the County Motion to Lift Invalidity and Dismiss

A-1

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An October 26, 2001 Compliance Order/FDO (CO/FDO) referenced 6 instances[3] which the Board had previously found substantially interfered with GMA goals (and which consequently served as the basis for imposing invalidity):

1. The exemption of coverage for Type 5 waters of less than 500 feet;
2. Buffer widths for minor new development in Type 2-5 waters;
3. Buffer widths for Type I waters in the Natural, Conservancy, and Rural designated areas under the SMP;
4. Allowance of a 25 foot buffer averaging under CCC 27.12.734 for minor new development in Type 4 and 5 waters;
5. Reduced buffers for Type 1 waters under the urban and suburban designations found in the SMP; and
6. Allowance of reduced critical area (CA) protection for all properties enrolled in the open space taxation program found in RCW 84.34.[4]

The County appealed the October 26, 2001 CO/FDO to the Clallam County Superior Court. That court's ruling was in turn appealed to the Court of Appeals, Division II, which issued its decision on October 25, 2005, a decision which included a remand to the Board to address compliance.

The Board subsequently issued an Order Finding Partial Compliance on January 27, 2006. That order noted the parties had stipulated to compliance on the first three matters referenced above, and that the Board had been reversed regarding numbers 4 and 5. Item 6 was thus the only remaining GMA issue before the Board.[5]

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[3] Compliance Order, Case No. 01-2-0020; Final Decision and Order, Case No. 00-2-0008 at 7.

[4] "In the FDO we found that the County's exemption of CA protections from pre-existing and ongoing agriculture throughout the County did not comply and substantially interfered with the goals of the Act. In response, Clallam County rejected limiting reduced CA protections to only designated resource land (RL) areas and allowed the reduced protection to apply to all existing agricultural uses in any zone that were in existence as of 1992 (the date of adoption of the original CAO) and that were also enrolled in the open space taxation program found in RCW 84.34." *Id.* at. 5

[5] Order Finding Parcel Compliance, January 27, 2006, at 3:"The Board's decision finding that CCC 27.12.035(7) is non-compliant and invalid was reversed by the Superior Court, but the Court of Appeals, Division II, affirmed the decision in part, reversed it in part , and remanded it for further proceedings before the Board. *Protect the Peninsula's Future v. Clallam County,* Docket No. 31283-2-II, October 25, 2005. [*Clallam County v. Hearings Bd.*, 130 Wn. App. 127]. The County has filed a petition for review with the Washington Supreme Court and expects a decision on that petition within the next 4 to 5 months." [the Supreme Court denied review].

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As to Item 6, the Court of Appeals decision held the Board erred when it decided that the County's CA exemption must be limited to designated agricultural resource lands rather than to all lands enrolled in the Open Space Taxation program. In remanding to the Board, the Court stated:

> This is not to say that the Board must approve the County's current exemption plan. If the County, to meet its local conditions, wants to exempt a number of small farms, it must then show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife. And the regulations must specifically address any threatened harm peculiar to the number and size of farms exempted. If the Board finds that the County has not met this burden, on remand the County may either reduce the amount of exempt land or more strictly control the more broadly exempted land.

Clallam County v. Hearings Bd., 130 Wn. App. 127, 140 (2005)

The Board also noted in its January, 2006 order that the County had filed a petition for review with the Washington Supreme Court. It then went on to state it would not set a compliance schedule pending a decision by the Supreme Court on the petition for review, a petition which was ultimately denied. Prior to the Supreme Court's denial of the County's petition for review, the legislature adopted SSB 5248 which suspended jurisdictions' powers to amend or adopt critical areas ordinances as they applied to agricultural activities (and referred the agriculture/critical area dispute to the Ruckelshaus Center for resolution). Subsequent legislation further extended that preclusion. Thereafter, in 2011 the legislature adopted ESHB 1886, the Voluntary Stewardship Program (VSP), codified as RCW 36.70A.700 through RCW 36.70A.760, together with amendments of RCW 36.70A.130 and RCW 36.70A.280. Counties which wished to participate in the VSP were required to so indicate by January 22, 2012.[6] Counties which did not choose to participate in the VSP remain subject to the RCW 36.70A.060 requirement to protect critical areas through the

[6] RCW 36.70A.710(1)(b).

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adoption of development regulations.[7] Clallam County did not elect to participate in the VSP.[8]

After the lengthy appeal and SSB 5248 hiatus, this matter returned to the attention of the Board when PPF filed a motion to set a new compliance date.[9] Compliance is due by January 24, 2013 with a compliance hearing scheduled for March 26, 2013.

II. PRELIMINARY MATTERS

At commencement of argument on the County's motion, PPF requested that the full panel consider PPF's prior motion to take notice of certain facts and to supplement the record. The request involved portions of PPF's proposed Exhibits 1031 and 1033 as well as Exhibits 1027-1030 and 1039. The Board took the request under advisement and, following deliberation, denies the request. WAC 242-03-530 grants the presiding officer the duty to rule on evidentiary matters and such a ruling was made in the Order on Motion to Supplement dated November 13, 2012. Furthermore, PPF's request amounts to a motion for reconsideration. Such motions are only authorized in regard to final orders of the Board.[10]

III. ISSUE TO BE DECIDED

Whether to grant the County's motion to dismiss, the effect of which would necessarily rescind the order of invalidity and, if that motion were to be denied, whether to lift invalidity.

IV. DISCUSSION AND ANALYSIS

The County's Motion to Dismiss is grounded in the VSP, a program which established an alternative method for counties to comply with the GMA's requirement[11] to protect critical

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[7] RCW 36.70A.710(1)(a): "As an alternative to protecting critical areas in areas used for agricultural activities through development regulations adopted under RCW 36.70A.060, the legislative authority of a county may elect to protect critical areas through the program [the VSP]. "
[8] Exhibit 1033, p. 4.
[9] Motion to Set New Compliance Date, filed July 23, 2012.
[10] WAC 242-03-830.
[11] RCW 36.70A.060.

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areas in areas used for agricultural activities.[12] As stated by the County: "If a county does not or cannot comply with the requirements for gaining approval of or implementing that program [the VSP], then the legislature established four options for such a county to comply with the GMA's requirements to protect critical areas."[13]

Those options are set out in RCW 36.70A.735 (emphasis added):

> (1) Within eighteen months after one of the events in subsection (2) of this section, a county must:
>
> (a) Develop, adopt, and implement a watershed work plan approved by the department that protects critical areas in areas used for agricultural activities while maintaining the viability of agriculture in the watershed. The department shall consult with the departments of agriculture, ecology, and fish and wildlife and the commission, and other relevant state agencies before approving or disapproving the proposed work plan. The appeal of the department's decision under this subsection is subject to appeal under RCW 36.70A.280;
>
> (b) **Adopt development regulations previously adopted under this chapter by another local government for the purpose of protecting critical areas in areas used for agricultural activities. Regulations adopted under this subsection (1)(b) must be from a region with similar agricultural activities, geography, and geology and must: (i) Be from Clallam,** Clark, King, or Whatcom counties; or (ii) have been upheld by a growth management hearings board or court after July 1, 2011, where the board or court determined that the provisions adequately protected critical areas functions and values in areas used for agricultural activities;
>
> (c) Adopt development regulations certified by the department as protective of critical areas in areas used for agricultural activities as required by this chapter. The county may submit existing or amended regulations for certification. The department must make its decision on whether to certify the development regulations within ninety days after the county submits its request. If the department denies the certification, the county shall take an action under (a), (b), or (d) of this subsection. The department must consult with the departments of agriculture, ecology, and fish and wildlife and the commission before making a certification under this section. The appeal of the department's decision under

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[12] RCW 36.70A.710(1)(a): "As an alternative to protecting critical areas in areas used for agricultural activities through development regulations adopted under RCW 36.70A.060, the legislative authority of a county may elect to protect such critical areas through the program."

[13] Clallam County's Motion to Dismiss and to Rescind the Order of Invalidity at 5.

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this subsection (1)(c) is subject to appeal under RCW 36.70A.280; or

(d) Review and, if necessary, revise development regulations adopted under this chapter to protect critical areas as they relate to agricultural activities.

The County focuses on the RCW 36.70A.735(1)(b) option which provides counties may achieve GMA compliance with the requirement to protect critical areas in areas used for agricultural activities by adopting regulations from one of the four listed counties. As Clallam County is one of the four, it takes the position the legislature determined Clallam County regulations are compliant with the GMA.[14]

PPF argues the VSP does not establish a means of compliance with RCW 36.70A.060.[15] Rather, it provides an alternative method for the protection of critical areas in areas used for agriculture. RCW 36.70A.060 and the VSP are two separate paths and the VSP provisions may not be used to satisfy the RCW 36.70A.060 requirements. PPF observes Clallam County did not opt in to the VSP and therefore remains subject to RCW 36.70A.060, and that the Board has previously ruled Clallam County Code 27.12.035(7) does not comply with that statute and imposed invalidity.[16] It argues RCW 36.70A.735(1)(b), the statute upon which the County relies, does not apply to Clallam County due to the fact it did not opt in to the VSP.

PPF argues there is but one way to interpret RCW 36.70A.735. That is, a county is subject to that statute only if it has opted in to the VSP and then any one of three things occurs: 1.) the county fails to obtain approval for its proposed work plan (RCW 36.70A.735(2)(a); 2.) the county fails to meet an approved work plan's goals and benchmarks (RCW 36.70A.735(2)(b)); or 3.) inadequate funding is received to implement the program (RCW 36.70A.735(2)(c) & (d)).

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[14] Motion to Rescind Order of Invalidity at 6,
[15] RCW 36.70A.060(2): "Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170."
[16] PPF Response to the County Motion at 7, referencing both the December 19, 2000 FDO, and the October 16, 2001 FDO/CO.

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Consequently, PPF asserts the options laid out in RCW 36.70A.735(1) are available only to those counties whose work plans were not approved, failed to meet goals or whose efforts were inadequately funded. Clallam County is not one of those counties. PFF presents a logical statutory interpretation.

On the other hand, the County's argument that the legislature's adoption of RCW 36.70A.735(1)(b) with the inclusion of Clallam County as one of the four "safe harbor" counties is more compelling. RCW 36.70A.735(1) establishes "fall back" alternatives for counties when their VSP work plans are not approved, fail or are unfunded. When that occurs, those "fall back" provisions require the county to adopt development regulations to protect critical areas, just as RCW 36.70A.060 does. RCW 36.70A.735(1)(b), one of the alternatives, allows counties to adopt previously adopted development regulations of one of four counties: Clark, King, Whatcom, and Clallam.[17] A county with similar agricultural activities, geography, and geology to one of the four named counties, and which is unable to complete its voluntary stewardship program, may simply adopt the development regulations of one of those counties thereby satisfying the GMA requirement to protect critical areas. Clearly, the legislature concluded the development regulations of those four counties were sufficiently protective of critical areas in areas used for agriculture.

Furthermore, the Board observes the position advanced by PPF could potentially produce an absurd result. For example, a county with similar agricultural activities, geography and geology to that of Clallam County and which elected to opt in to the VSP could conceivably adopt Clallam County's existing development regulations. Those development regulations would be deemed to adequately protect critical areas in areas used for agricultural activities and thus be GMA compliant. On the other hand, the identical development regulations adopted by Clallam County would not be sufficient to protect such critical areas and would fail to comply with the GMA.

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[17] Clallam County was included as one of the four counties notwithstanding the fact the Board, in this case, had determined its development regulations were non-compliant with the GMA and subjected them to an order of invalidity.

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One of the roles of the Growth Management Hearings Board in interpreting the GMA is to give effect to legislative intent and avoid unlikely or absurd results.[18] While the VSP statutory framework now before the Board is less than clearly drafted, the Board concludes the interpretation advanced by the County is the appropriate one.

V. ORDER

Based on the foregoing, the briefing and arguments of the parties, and having deliberated on the matter, the Board grants Clallam County's Motion to Dismiss. Dismissal serves also to rescind the order of invalidity. This case is closed.

Dated this 13th day of December, 2012

William Roehl, Board Member

Nina Carter, Board Member

Chuck Mosher, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[19]

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[18] *Kennewick v. Board For Firefighters*, 85 Wn. App. 366, 369:
The court, in interpreting a statute, must give effect to the Legislature's intent and avoid unlikely or absurd consequences.
State v. Elgin, 118 Wn.2d 551, 555 (citations omitted):
Our paramount duty in statutory interpretation is to give effect to the Legislature's intent. We avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences. The spirit or purpose of an enactment should prevail over the express but inept wording."
FOSC v. Skagit County, WWGMHB Case No. 95-2-0065c, Order Rescinding Invalidity, July 14, 1997:
Either is an absurd result. In interpreting the GMA, our role is to give effect to Legislative intent and to avoid unlikely or absurd results.

[19] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.

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CONCURRENCE

Although I concur with the result of this decision, I remain concerned Clallam County adopted development regulations that may not comply with the GMA. Obviously, the Board cannot ignore the 2011 Legislative action (ESHB 1886) which referenced Clallam County in the Voluntary Stewardship Program.[20] Nevertheless, I am concerned the Board was unable to determine whether Clallam County was in compliance. That determination would have been made at subsequent remand hearings the Board did not hold. The Board could not test the Court's remand parameters as shown here:[21]

> This is not to say that the Board must approve the County's current exemption plan. If the County, to meet its local conditions, wants to exempt a number of small farms, ***it must then show that by using best available science it has tailored the exemption to reasonably ameliorate potential harm to the environment and fish and wildlife.*** And the regulations must specifically ***address any threatened harm peculiar to the number and size of farms exempted.*** If the Board finds that the County has not met this burden, on remand the County may either reduce the amount of exempt land or more strictly control the more broadly exempted land. (emphasis added)

The Court's remand states the County may exempt some agricultural practices from critical area requirements, but in doing so the County must show it used Best Available Science (BAS) tailoring the exemption to ameliorate environmental harm. Without hearing from the

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A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

[20] RCW 36.70A.735(1) (b) Adopt development regulations previously adopted under this chapter by another local government for the purpose of protecting critical areas in areas used for agricultural activities. Regulations adopted under this subsection (1)(b) must be from a region with similar agricultural activities, geography, and geology and must: (i) Be from **Clallam**, Clark, King, or Whatcom counties; or (ii) have been upheld by a growth management hearings board or court after July 1, 2011, where the board or court determined that the provisions adequately protected critical areas functions and values in areas used for agricultural activities. (emphasis added)

[21] Order Finding Partial Compliance, January 27, 2006, at 3. The Board's decision finding that CCC 27.12.035(7) is non-compliant and invalid was reversed by the Superior Court, but the Court of Appeals, Division II, affirmed the decision in part, reversed it in part, and remanded it for further proceedings before the Board. *Protect the Peninsula's Future v. Clallam County,* Docket No. 31283-2-II, October 25, 2005. [*Clallam County v. Hearings Bd.,* 130 Wn. App. 127]

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County whether it completed the BAS work and "tailored the exemption," the Board could not determine GMA compliance. But for the 2011 Legislative action, the Board would have been in a position to make that determination.

Nina Carter

Nina Carter, Board Member

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RCW 36.70A.060
Natural resource lands and critical areas — Development regulations.

(1)(a) Except as provided in *RCW 36.70A.1701, each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170. Regulations adopted under this subsection may not prohibit uses legally existing on any parcel prior to their adoption and shall remain in effect until the county or city adopts development regulations pursuant to RCW 36.70A.040. Such regulations shall assure that the use of lands adjacent to agricultural, forest, or mineral resource lands shall not interfere with the continued use, in the accustomed manner and in accordance with best management practices, of these designated lands for the production of food, agricultural products, or timber, or for the extraction of minerals.

(b) Counties and cities shall require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of, lands designated as agricultural lands, forest lands, or mineral resource lands, contain a notice that the subject property is within or near designated agricultural lands, forest lands, or mineral resource lands on which a variety of commercial activities may occur that are not compatible with residential development for certain periods of limited duration. The notice for mineral resource lands shall also inform that an application might be made for mining-related activities, including mining, extraction, washing, crushing, stockpiling, blasting, transporting, and recycling of minerals.

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991. For the remainder of the counties and cities, such development regulations shall be adopted on or before March 1, 1992.

(3) Such counties and cities shall review these designations and development regulations when adopting their comprehensive plans under RCW 36.70A.040 and implementing development regulations under RCW 36.70A.120 and may alter such designations and development regulations to insure consistency.

(4) Forest land and agricultural land located within urban growth areas shall not be designated by a county or city as forest land or agricultural land of long-term commercial significance under RCW 36.70A.170 unless the city or county has enacted a program authorizing transfer or purchase of development rights.

[2005 c 423 § 3; 1998 c 286 § 5; 1991 sp.s. c 32 § 21; 1990 1st ex.s. c 17 § 6.]

Notes:

***Reviser's note:** RCW 36.70A.1701 expired June 30, 2006.

Intent -- Effective date -- 2005 c 423: See notes following RCW 36.70A.030.

A-11

RCW 36.70A.172
Critical areas — Designation and protection — Best available science to be used.

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

(2) If it determines that advice from scientific or other experts is necessary or will be of substantial assistance in reaching its decision, the growth management hearings board may retain scientific or other expert advice to assist in reviewing a petition under RCW 36.70A.290 that involves critical areas.

[2010 c 211 § 3; 1995 c 347 § 105.]

Notes:

Effective date -- Transfer of power, duties, and functions -- 2010 c 211: See notes following RCW 36.70A.250.

Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347: See notes following RCW 36.70A.470.

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36.70A.710
Critical areas protection — alternative to rcw 36.70a.060 — county's responsibilities — procedures.

(1)(a) As an alternative to protecting critical areas in areas used for agricultural activities through development regulations adopted under RCW 36.70A.060, the legislative authority of a county may elect to protect such critical areas through the program.

(b) In order to participate in the program, within six months after July 22, 2011, the legislative authority of a county must adopt an ordinance or resolution that:

(i) Elects to have the county participate in the program;

(ii) Identifies the watersheds that will participate in the program; and

(iii) Based on the criteria in subsection (4) of this section, nominates watersheds for consideration by the commission as state priority watersheds.

(2) Before adopting the ordinance or resolution under subsection (1) of this section, the county must (a) confer with tribes, and environmental and agricultural interests; and (b) provide notice following the public participation and notice provisions of RCW 36.70A.035 to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations.

(3) In identifying watersheds to participate in the program, a county must consider:

(a) The role of farming within the watershed, including the number and acreage of farms, the economic value of crops and livestock, and the risk of the conversion of farmland;

(b) The overall likelihood of completing a successful program in the watershed; and

(c) Existing watershed programs, including those of other jurisdictions in which the watershed has territory.

(4) In identifying priority watersheds, a county must consider the following:

(a) The role of farming within the watershed, including the number and acreage of farms, the economic value of crops and livestock, and the risk of the conversion of farmland;

(b) The importance of salmonid resources in the watershed;

(c) An evaluation of the biological diversity of wildlife species and their habitats in the geographic region including their significance and vulnerability;

(d) The presence of leadership within the watershed that is representative and inclusive of the interests in the watershed;

(e) Integration of regional watershed strategies, including the availability of a data and scientific review structure related to all types of critical areas;

(f) The presence of a local watershed group that is willing and capable of overseeing a successful program, and that has the operational structures to administer the program effectively, including professional technical assistance staff, and monitoring and adaptive management structures; and

(g) The overall likelihood of completing a successful program in the watershed.

(5) Except as otherwise provided in subsection (9) of this section, beginning with the effective date of the ordinance or resolution adopted under subsection (1) of this section, the program applies to all unincorporated property upon which agricultural activities occur within a participating watershed.

(6)(a) Except as otherwise provided in (b) of this subsection, within two years after July 22, 2011, a county must review and, if necessary, revise development regulations adopted under this chapter to protect critical areas as they specifically apply to agricultural activities:

(i) If the county has not elected to participate in the program, for all unincorporated areas; or

(ii) If the county has elected to participate in the program, for any watershed not participating in the program.

(b) A county that between July 1, 2003, and June 30, 2007, in accordance with RCW 36.70A.130 completed the review of its development regulations as required by RCW 36.70A.130 to protect critical areas as they specifically apply to agricultural activities is not required to review and revise its development regulations until required by RCW 36.70A.130.

(c) After the review and amendment required under (a) of this subsection, RCW 36.70A.130 applies to the subsequent review and amendment of development regulations adopted under this chapter to protect critical areas as they specifically apply to agricultural activities.

(7)(a) A county that has made the election under subsection (1) of this section may withdraw a participating watershed from the program by adopting an ordinance or resolution withdrawing the watershed from the program. A county may withdraw a watershed from the program at the end of three years, five years, or eight years after receipt of funding, or any time after ten years from receipt of funding.

(b) Within eighteen months after withdrawing a participating watershed from the program, the county must review and, if necessary, revise its development regulations that protect critical areas in that watershed as they specifically apply to agricultural activities. The development regulations must protect the critical area functions and values as they existed on July 22, 2011. RCW 36.70A.130 applies to the subsequent review and amendment of development regulations adopted under this chapter to protect critical areas as they specifically apply to agricultural activities.

(8) A county that has made the election under subsection (1) of this section is eligible for a share of the funding made available to implement the program, subject to funding availability from the state.

(9) A county that has made the election under subsection (1) of this section is not required to implement the program in a participating watershed until adequate funding for the program in that watershed is provided to the county.

[2011 c 360 § 4.]

36.70A.715
Funding by commission — county's duties — watershed group established.

(1) When the commission makes funds available to a county that has made the election provided in RCW 36.70A.710(1), the county must within sixty days:

(a) Acknowledge the receipt of funds; and

(b) Designate a watershed group and an entity to administer funds for each watershed for which funding has been provided.

(2) A county must confer with tribes and interested stakeholders before designating or establishing a watershed group.

(3) The watershed group must include broad representation of key watershed stakeholders and, at a minimum, representatives of agricultural and environmental groups and tribes that agree to participate. The county should encourage existing lead entities, watershed planning units, or other integrating organizations to serve as the watershed group.

(4) The county may designate itself, a tribe, or another entity to coordinate the local watershed group.

[2011 c 360 § 5.]

36.70A.720
Watershed group's duties — work plan — conditional priority funding.

(1) A watershed group designated by a county under RCW 36.70A.715 must develop a work plan to protect critical areas while maintaining the viability of agriculture in the watershed. The

(1) Upon receipt of a report by a watershed group under RCW 36.70A.720(2)(b) that the work plan goals and benchmarks have been met, the director must consult with the statewide advisory committee. If the director concurs with the watershed group report, the watershed group shall continue to implement the work plan. If the director does not concur with the watershed group report, the director shall consult with the statewide advisory committee following the procedures in subsection (2) of this section.

(2) If either the director, following receipt of a report under subsection (1) of this section, or the watershed group, in the report submitted to the director under RCW 36.70A.720(2)(b), concludes that the work plan goals and benchmarks for protection have not been met, the director must consult with the statewide advisory committee for a recommendation on how to proceed. If the director, acting upon recommendation from the statewide advisory committee, determines that the watershed is likely to meet the goals and benchmarks with an additional six months of planning and implementation time, the director must grant an extension. If the director, acting upon a recommendation from the statewide advisory committee, determines that the watershed is unlikely to meet the goals and benchmarks within six months, the watershed is subject to RCW 36.70A.735.

(3) A watershed that fails to meet its goals and benchmarks for protection within the six-month time extension under subsection (2) of this section is subject to RCW 36.70A.735.

[2011 c 360 § 8.]

36.70A.735
When work plan is not approved, fails, or is unfunded — county's duties — rules.

(1) Within eighteen months after one of the events in subsection (2) of this section, a county must:

(a) Develop, adopt, and implement a watershed work plan approved by the department that protects critical areas in areas used for agricultural activities while maintaining the viability of agriculture in the watershed. The department shall consult with the departments of agriculture, ecology, and fish and wildlife and the commission, and other relevant state agencies before approving or disapproving the proposed work plan. The appeal of the department's decision under this subsection is subject to appeal under RCW 36.70A.280;

(b) Adopt development regulations previously adopted under this chapter by another local government for the purpose of protecting critical areas in areas used for agricultural activities. Regulations adopted under this subsection (1)(b) must be from a region with similar agricultural activities, geography, and geology and must: (i) Be from Clallam, Clark, King, or Whatcom counties; or (ii) have been upheld by a growth management hearings board or court after July 1, 2011, where the board or court determined that the provisions adequately protected critical areas functions and values in areas used for agricultural activities;

(c) Adopt development regulations certified by the department as protective of critical areas in areas used for agricultural activities as required by this chapter. The county may submit existing or amended regulations for certification. The department must make its decision on whether to certify the development regulations within ninety days after the county submits its request. If the department denies the certification, the county shall take an action under (a), (b), or (d) of this subsection. The department must consult with the departments of agriculture, ecology, and fish and wildlife and the commission before making a certification under this section. The appeal of the department's decision under this subsection (1)(c) is subject to appeal under RCW 36.70A.280; or

(d) Review and, if necessary, revise development regulations adopted under this chapter to protect critical areas as they relate to agricultural activities.

(2) A participating watershed is subject to this section if:

(a) The work plan is not approved by the director as provided in RCW 36.70A.725;

(b) The work plan's goals and benchmarks for protection have not been met as provided in RCW 36.70A.720;

(c) The commission has determined under RCW 36.70A.740 that the county, department, commission, or departments of agriculture, ecology, or fish and wildlife have not received adequate funding to implement a program in the watershed; or

(d) The commission has determined under RCW 36.70A.740 that the watershed has not received adequate funding to implement the program.

(3) The department shall adopt rules to implement subsection (1)(a) and (c) of this section.

[2011 c 360 § 9.]

36.70A.740
Commission's duties — timelines.

(1) By July 31, 2015, the commission must:

(a) In consultation with each county that has elected under RCW 36.70A.710 to participate in the program, determine which participating watersheds received adequate funding to establish and implement the program in a participating watershed by July 1, 2015; and

(b) In consultation with other state agencies, for each participating watershed determine whether state agencies required to take action under the provisions of RCW 36.70A.700 through